

Plasterers and Cement Masons, AFL-CIO, Local Union No. 165 and Trans Tech Electric, Inc.

Northwest Indiana District Council of Carpenters, Local No. 599 and Trans Tech Electric, Inc.
Cases 13-CD-454-1 and 13-CD-454-2

May 26, 1992

**DECISION AND DETERMINATION
OF DISPUTE**

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The charges in this Section 10(k) proceeding were filed January 30, 1992, by the Employer, Trans Tech Electric, Inc., alleging that the Respondents, Plasterers and Cement Masons, AFL-CIO, Local Union No. 165 (Plasterers) and Northwest Indiana District Council of Carpenters, Local No. 599 (Carpenters) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees they represent rather than to employees represented by Laborers International Union of North America, Local No. 41 (Laborers). The hearing was held February 13, 1992, before Hearing Officer William M. Belkov.

The National Relations Labor Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Indiana corporation whose principal place of business is in South Bend, Indiana, is an electrical contractor specializing in highway lighting, traffic signals, and highway "signing." During the past calendar year, the Employer derived from its Indiana location gross revenues in excess of \$50,000 from its sale and performance of services to customers directly outside the State of Indiana. The Employer and the Laborers stipulated,¹ and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers is a labor organization within the meaning of Section 2(5) of the Act. The record reveals, and we find, that Carpenters and Plasterers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is subcontractor to Walsh Construction Company for sign and lighting work on the jobsite

at 7500 North Kennedy Avenue, Hammond, Indiana. The subcontract was to perform highway signing work, including sign structures and their foundation, and highway lighting work, including their supporting structures and foundations. The Employer assigned the sign work to employees represented by the Laborers.²

On January 29, 1992,³ while the Employer was in the process of digging for a high mast tower foundation, Don Herder, business agent for the Plasterers, and Bob Novak, business agent for the Carpenters, came to the construction site. Novak told Robert Opaczewski, superintendent for the Employer, that he had to inform Brian Higgins, project engineer for Walsh Construction, that if Trans Tech did not cease operations on the job, Novak "would have 250 pickets out there the next day."

On January 29, Novak and Herder told Higgins that Trans Tech was doing their work and that they would shut the job down if something was not done about it. Higgins asked Herder what he was doing there, and Herder said that "they are also doing part of our work." Because of the threats of job shutdown, Higgins and Jeff Dunifon, area manager for Walsh Construction, asked the Employer to stop working.

Trans Tech employees went back to work on February 3. At 7 a.m. on February 7, with Dunifon's permission, Trans Tech employees began work on the sign foundations. At 8:30 a.m. Dunifon received a call from Novak who, after inquiring and being told that Trans Tech employees were preparing the form and pouring the foundation for the signs, said: "[T]hat is our work, they cannot do that. There will be problems because my boss has not accepted that." When Dunifon said that he was not going to put a carpenter on and was not going to direct Trans Tech's work, Novak became very angry and said there would be "great consequences." Dunifon called Robert Urbanski, president of Trans Tech, and requested that he not perform the work that day and see if this issue could be resolved. As of the day of the hearing, the issue had not been resolved and Dunifon requested that Trans Tech not go back to work on this phase of work.

B. Work in Dispute

The disputed work in Case 13-CD-454-1 involves finishing cement foundations of high mast towers and foundations for sign structures. The disputed work in Case 13-CD-454-2 involves the installation of forming for foundations of high mast towers and forming for foundations for sign structures.⁴ The jobsite in both

² The lighting work is performed by employees represented by a local of the Electrical Workers that is not a party to this dispute.

³ All subsequent dates are in 1992 unless otherwise noted.

⁴ The notice of hearing described the disputed work only as to foundations of high mast towers. At the hearing, pursuant to a stipulation between the Employer and the Laborers, the description of the

Continued

¹ The Respondents did not appear at the hearing.

cases is, as noted above, at 7500 North Kennedy Avenue, Hammond, Indiana.

C. Contentions of the Parties

The Employer contends that reasonable cause exists to believe that the Plasterers and the Carpenters violated Section 8(b)(4)(D) of the Act. The Employer further contends that the work in dispute should be awarded to employees represented by the Laborers on the basis of their collective-bargaining agreement, employer preference and past practice, economy and efficiency of operations, and skills and special training. The Employer seeks a broad order. The Employer alleges that, not only has it been stopped from working on this job for Walsh Construction, but in 1991 it had work taken away by Superior Construction Co. because of the Carpenters' threats. The Employer fears similar action on a future job for Superior which was scheduled to commence the week after the hearing.

The Laborers agree with the Employer that the disputed work is covered by their collective-bargaining agreement. In addition, Laborers contends that the area practice is to assign work of this type to employees represented by Laborers.

Although afforded notice and opportunity to appear at the hearing, the Plasterers and the Carpenters did not make an appearance nor did either file any posthearing brief.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a union has threatened to or has used proscribed means to force an employer to assign work to one group of employees rather than to another.

As discussed above, Carpenters Business Agent Novak told Opaczewski, the Employer's superintendent, that if Trans Tech did not cease operations the Carpenters would have 250 pickets out there the next day. Both Novak and Plasterers Business Agent Herder told Higgins, Walsh's project engineer, that Trans Tech was doing their work and that they would shut the job down if something was not done about it. In addition, on February 7, when Trans Tech commenced work on the sign foundations, Novak called Dunifon, Walsh's area manager, claimed the work, and threatened "great consequences."

disputed work was amended to include sign structure work. The hearing was adjourned sine die and the record was left open to give the Carpenters and Plasterers (who did not appear at the hearing) an opportunity to respond. No timely response was received and the hearing was closed. The record supports the expanded description of the disputed work.

Based on the foregoing, we find reasonable cause to believe that both Carpenters and Plasterers have violated Section 8(b)(4)(D). We further find that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.⁵

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no evidence that any of the Unions was ever certified by the Board to represent the employees of the Employer. The Employer has a collective-bargaining agreement with the Laborers effective April 1, 1990, through March 31, 1993.⁶ In addition, the record

⁵ The Carpenters executed disclaimers dated February 4 and 7. The February 4 disclaimer stated, "The Union has no interest in the work identified in N.L.R.B. Case #13-CD-454-2." The February 7 document repeated the disclaimer and added, inter alia, "There have been no threats made and will be no threats made or any other illegal actions taken."

The Plasterers filed a disclaimer which stated, "Cement Masons Local 165 disclaims the work in Case 13-CD-454-1, concerning the assignment of the following tasks: Finishing of cement foundations of high mast towers at the Construction site located at 7500 N. Kennedy Avenue, Hammond, Indiana 46325. The Cement Masons Local 165 will not file a grievance on the case #13-CD-454-1."

We find that the disclaimers were not effective because they did not clearly, unequivocally, and unqualifiedly disclaim all interest in the work in dispute. As noted above, the definition of the disputed work was amended at the hearing to include sign structure work. Even viewing the disclaimers in the manner most favorable to the Respondents, they cannot be interpreted to apply to the sign structure work. Disclaimer of only part of the disputed work is not an effective disclaimer of interest in the work. *Laborers (Paschen Contractors)*, 270 NLRB 327, 328 (1984).

Further, by a phone call on February 7, the same day as the Carpenters' second disclaimer, the Carpenters' representative again claimed the sign structure work and made a threat of "great consequences" if a Carpenters-represented employee was not put on the job. This statement is inconsistent with a disclaimer of the sign structure work.

⁶ The Employer is signatory to a contract between Indiana Constructors, Inc. and Local Unions of Laborers' International Union of North America. Art. I of the contract covers highway construction including construction incidental thereto. Art. XXIX prescribes wages for categories of workers including "Sign Installation, including supporting structures."

contains a letter of September 16, 1991, from the Employer to the Laborers International making a written assignment of all highway sign work to employees represented by the Laborers Local Union. The Employer does not have a contract with either the Carpenters or the Plasterers. This factor favors awarding the work in dispute to employees represented by the Laborers.

2. Company preference and past practice

The Employer prefers that the work in dispute be performed by employees represented by the Laborers. The Employer has used laborers to do this type of work since it commenced business in January 1983 and prefers to continue to do so. This factor favors awarding the work in dispute to employees represented by the Laborers.

3. Area and industry practice

Urbanski and Opaczewski each testified that his previous employer, as well as Trans Tech, used employees represented by the Laborers to do this type of work. Richard Green, secretary-treasurer of Laborers Local 41, testified that the work at issue has been performed by employees represented by Laborers in Lake County and the whole State of Indiana, and he was not aware of any similar jobs that the Laborers-represented employees had not done during the 11 years he had been in office. The evidence of area practice is limited to the personal experience of the individuals who testified and to the past practice of the Employer. There was no evidence concerning industry practice. We find that the evidence is inconclusive and that this factor does not favor awarding the work in dispute to any specific group of employees.

4. Relative skills

The Employer attested to the skill of employees represented by the Laborers and presented evidence of the special training offered by the Laborers to its members in sign erection, form building, form setting, and concrete work. Because there is no evidence in the record regarding the skills and training of the Plasterers and Carpenters in doing the disputed work, we find that this factor favors awarding the work in dispute to employees represented by the Laborers.

5. Economy and efficiency of operations

The record shows that it is more economical and efficient to use Laborers-represented employees for the disputed work. Laborers are already on the job helping excavate and are trained in sign erecting and in forming. The forming is very simple in most cases, and it is more economical and efficient to have the laborers set the form, pour the concrete, and put the reinforcing steel in it. The alternative would be to place two carpenters, a cement finisher, maybe two iron workers,

some laborers, and operators on the job, which would make it economically unfeasible to perform the work. We find that this factor favors awarding the work in dispute to employees represented by the Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers International Union of North America, Local No. 41 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between the Employer and the Laborers, employer preference and past practice, economy and efficiency of operations, and relative skills.

In making this determination, we are awarding the work to employees represented by Laborers International Union of North America, Local No. 41, not to that Union or its members.

Scope of Award

The Employer requests a broad award covering all present and future jobsites where employees represented by the Laborers are utilized to perform this type of work. Generally, in order to support a broad award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged parties have a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144, 1148 (1980). We find that the record does not support a broad award.

The Employer presented evidence that the Carpenters made threats in August 1991 when the Employer was subcontractor for similar work for Superior Construction Co., Inc. (Superior). Superintendent Opaczewski testified that Carpenters Business Agent Novak stated he did not recognize Trans Tech's agreement with the Laborers and that he would shut the job down if they continued to do the work. Opaczewski also testified that Novak threatened at that time to put Trans Tech out of business and to go to South Bend and "take care of business there" if they proceeded with work over there. The Employer claims that, as a result of the dispute, Superior withdrew the sign work from Trans Tech's contract. There was no Board determination of that dispute. Urbanski testified that he did not file a charge because he did not know that the Board process was available.

The Employer asserts that it now fears similar action in an upcoming contract with Superior. Urbanski testified that Lagura from Superior had advised him that the Carpenters and Plasterers were claiming the work and that if the dispute was not resolved, Superior would again withdraw the sign work from the contract.

However, the Employer presented no direct evidence of any unlawful threats made by the Respondents in regard to the upcoming job. Opaczewski testified that he had heard of threats “through the grapevine” but that he had no direct knowledge of any threats relating to the upcoming job.

The Board has not previously determined jurisdictional disputes involving these parties. Further, the record is insufficient to demonstrate the likelihood that the Plasterers and Carpenters will resort to unlawful means in the future to obtain assignment of work similar to that in dispute. Under these circumstances, we find that the determination should be limited to the particular controversy which gave rise to this proceeding. See generally *Teamsters Local 170 (Barletta Co.)*, 248 NLRB 1008, 1012 fn. 6 (1980); *Electrical Workers IBEW 103 (Comm-Tract)*, 289 NLRB 281, 283 fn. 6 (1988).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Trans Tech Electric, Inc. represented by Laborers International Union of North America, Local No. 41 are entitled to perform finishing of cement foundations of high mast towers and foundations for sign structures, and the installation of forming for foundations of high mast towers and forming for foundations for sign structures at the jobsite located at 7500 North Kennedy Avenue, Hammond, Indiana.

2. The Respondents, Plasterers and Cement Masons, AFL-CIO, Local Union No. 165 and Northwest Indiana District Council of Carpenters, Local No. 599, are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force the Employer to assign the disputed work to employees represented by them.

3. Within 10 days from this date, Plasterers and Cement Masons, AFL-CIO, Local Union No. 165 and Northwest Indiana District Council of Carpenters, Local No. 599 shall notify the Regional Director for Region 13 in writing whether they will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.